United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

10-4

BRIEF FOR APPELLANT

533

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

NO. 23,797

UNITED STATES OF AMERICA

Appellee

-vs-

TYRONE PARKER

Appellant

APPEAL FROM JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

* Cases chiefly relied upon are marked by asterisks

No. 23,797

ISSUES PRESENTED FOR REVIEW

The Defendant Parker was convicted of entering a bank with intent to commit robbery, armed robbery and assault with a dangerous weapon.

1. Was there sufficient evidence that the Defendant Parker participated in the commission of any of the offenses set forth in any of the counts in the indictment to take any of the counts to the jury?

2. Was the Defendant Parker prejudiced and deprived of a fair trial by the Government attorney's reference that he had been confined to the John Howard Pavilion (at Saint Elizabeth's Hospital) and thereby intimitating that he had been accused of another crime?

References to Rulings - None

This case has not previously been before this Court

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction over the subject matter pursuant to Sections 11-521 and 23-103 of the District of Columbia Code. The jurisdiction of this Court of Appeals is premised on 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

An indictment was filed on October 14, 1968, charging the Defendant Parker on 16 counts with three other named persons (William Strange, Don E. Lowery and Thomas White, Jr.) as follows:

First count: entering a bank in which the deposits of which were insured by the Federal Deposit Insurance Corporation with intent to commit robbery; second count: armed robbery from Jean Major; third count: armed robbery; fourth count: armed robbery; fifth count: assault with a dangerous weapon, a pistol on Jean Major; sixth count: armed robbery from John A. Burton of funds insured by the Federal Deposit Insurance Corporation; seventh count: armed robbery; eighth count: armed robbery from the bank; ninth count: assault with a dangerous weapon on John A. Burton; tenth count: assault with a dangerous weapon on Ralph Goodman; eleventh count: assault with a dangerous weapon on Wilbur C. Huckstep; twelfth count: assault with a dangerous weapon on Luther R. Pinkard; thirteenth count: assault with a dangerous weapon on William Brown; fourteenth count: assault with a dangerous weapon on Theodora D. Johnson; fifteenth count: assault with a dangerous weapon on Katherine Marshall; sixteenth count: assault with a dangerous weapon on Linda Coble.

On the 29th day of January, 1969, the Defendant Parker pleaded not guilty to the indictment.

At the close of the Government's case, judgment of acquittal was granted as to counts 9, 10, 11, 13, 14, 15 and 16 and the case was allowed to continue on the first eight counts with the twelfth count being changed to the ninth count. The trial before Judge John Lewis Smith, Jr. and a jury on September 16, 17, 18, and 19, 1969 resulted in the Defendant being found

guilty on counts 1, 2, 3, 5, 6, 7, and 9 of the remaining counts.

On November 20, 1969, the Defendant Parker was sentenced as follows:

Six (6) years to twenty (20) years on Counts 1 and 2

Fifteen (15) years to forty-five (45) years on Counts 3 and 7

Five (5) years to fiteen (15) years on Count 6

Three (3) years to ten (10) years on Counts 5 and 9

Said sentences to run concurrently by the Count and concurrently with any other sentences now being served.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

On August 15, 1968, at about 11:59 A.M. a bank robbery occurred at the Branch Office of The American Security and Trust Company located at 822 East Capitol Street, Washington, D.C. and several employees of the bank were held at bay with pistol. Two bank employees (Luther R. Pinkard and Jean Major) testified that three men armed with revolvers entered the bank, that two of the men jumped over the counters and took money from the cashier cage somewhat contained in the lobby of the bank; that pictures were taken that were identified as the men in the act of robbing the bank and bank employees. The two bank employees saw the threemen leave the bank but did not know what happened after they did so. (TR-24-47) The Defendant Parker was not one of the

three men who had entered the bank as the pictures plainly showed and this was conceded by the Government. (TR 21)

A witness, Carnley Comer, saw the three men run out of the bank and enter into an automobile driven by a fourth man, whom he could identify as only a young negro. (TR-119-123) There was no other evidence of identification of the driver on the Government's side of the case.

On the defense side of the case, William White, Jr. who pleaded guilty to the said robbery testified for the defense that the Defendant Parker was not the driver and that Parker had nothing to do with the robbery and identified another person as the driver. (TR 189-223)

The prosecutive theory of the Government's case was that the Defendant Parker "was an aider and an abettor" and that he "played ... the role of a conniver" and drove the getaway car. (TR-21)

In support of this theory the only evidence adduced by the Government was the Defendant Parker was seen entering an automobile approximately four blocks away from the scene of the robbery and some ten minutes or more before the robbery in the front seat passenger side. The automobile was in a parked position and was later identified by its license plate as the getaway car; that when the Defendant Parker entered the said automobile one other person entered on the driver's side and this driver was later identified

in the pictures as the driver of the automobile when Defendant Parker entered it. The driver had been listening to a radio and Parker had a gun in his belt according to Arthur Lee Dawson. (TR 47-110)

There was also evidence that the Defendant Parker and his wife several days later were seen talking with some of the identified robbers in the City of New York. (TR 132-134) A Motion was made for a Judgment of Acquittal at the close of the Government's case and was granted as to the counts previously stated and the case went forward in the remaining nine counts. The Defendant Parker had testified on his own behalf denying participation in the robbery. On cross examination he was asked by the Government's attorney "Q. Mr. Parker, Isn't it a fact that you were confined in John Howard Pavilion in September, October, November and December of 1968" intimitating that he was awaiting trial or confined in Saint Elizabeth's Hospital or was confined there after a trial on a criminal charge. Objection was made by counsel for Parker and a Motion for a Mistrial was denied.

STATUTES INVOLVED

18 USC 2113 (a)

22 D.C. Code 2901, 3202, 502

ARGUMENTS

I. The Trial Court erred in denying the Motion of the Defendant Parker for a judgment of acquittal after all the evidence was in since the evidence was legally insufficient to enable a jury to conclude beyond a reasonable doubt that he participated in the commission of the bank robbery offenses.

The record is barren of proof that the Defendant Parker was an active perpetrator of the offenses and the Government concedes this. If his convictions are to stand at all, it is only the premise that he aided and abetted the actual robbers of the bank.

In passing upon a Motion for Direct Verdict of Acquittal, the trial judge must determine whether, upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. For that purpose the judge "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom" Curley vs. United States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, cert. denied 331 U.S. 837, 67 S.Ct. 1511, 91 L.Ed. 1850 (1947). Nye & Nissen v. United States, 336 U.S. 613, 618-620, 69 S.Ct. 766, 93 L.Ed. 919 (1949).

The Defendant Parker's conduct as portrayed in the view most favorable to the Government amounted to slight prior association with one of the actual perpetrators ten minutes or so before the bank robbery and slight association with them a day or a day and a half after the bank robbery. However, as said in Bailey v. United States, ___US APP DC___, 416 F.2d 110 (1969), the "sine qua non of aiding and abetting however is guilty participation by the accused". This Court further stated in that opinion citing from Nye & Nissen v. United States, supra, "in order to aid and abet another to commit a crime it is necessary that a Defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seeks by his action to make it succeed."

The Government's aiding and abetting theory, as argued to the jury was that Mr. Parker "was outside (the bank), that he played a very active role and that he mobilized these people; that he provided the car; that he provided, perhaps, one of the gunds and that he provided the getaway driver, himself, who was also a look-out on the street and that he proceeded by means of the radio -- that he provided the radio and the car with the false plates, some means to avoid attention and to help his escape". (TR 441). There was no evidence to sustain this theory that Mr. Parker was outside the bank, there was no evidence

of any planning and mobilizing people together, there was no evidence that he provided the car but merely that he had entered the front seat on the passengers side ten minutes before the robbery. There is no evidence that he provided perhaps one gun and this would have to be pure speculation and there was no evidence that he was the getaway driver or that he provided the getaway driver. Also there was no evidence that he was outside on the street as a look-out. There has been no evidence of any type in the Government's case to even show his presence at the scene of the robbery. As was mentioned in Bailey v. U.S., supra, on very similiar facts where there was no evidence to sustain participation by the accused charged as an aider and abettor to a robbery this Court set forth the law as follows:

> "The Government urges the efficacy of appellant's presence when it is coupled with his association with the perpetrator on the date of and shortly prior to the robbery. But an accused's prior association with one who is to become a criminal offender, even when coupled with the accused's later presence at the scene of the offense, does not warrant an inference of guilty collaboration. Moreover, here the uncontradicted evidence shows that each of appellant's several brief meetings with the eventual robbery occurred on the street or the parking lot in the open view of others, including the men with whom appellant fraternized for some time in a dice game - evidence becoming even more eloquent when scrutinized in the light of what was not shown at trial. The Government's proof did not expose appellant as a planner of the robbery, or as an aide or lookout in its consummation, or as one who shared in its proceeds, or even as one who knew the unidentified robber.

> In these circumstances, we cannot say that reasonable jurors could find a taint of criminality in appellant's limited association with him."

It is respectfully submitted that the law as set forth in Bailey vs. U.S., supra, is controlling in this case and should have been applied by the lower court. The Bailey v. U.S., supra, case also cited the following cases in support of its opinion:

Story v. United States, 57 App. D.C. 3, 4, 16 F.2d 342, 343 53 A.L.R. 246 (1926), cert. denied 274 U.S. 739, 47 S.Ct. 576, 71 L.Ed. 1318 (1927); Hicks v. United States, 150 U.S. 442, 14 S.Ct. 144, 37 L.Ed. 1137 (1893).

II. The Government Attorney's Reference to Prior Confinement of Defendant Parker Effectively Deprived Him of A Fair Trial.

The Defendant was prejudiced and deprived of a fair trial by the Government's attorneys reference that he had been confined to John Howard Pavilion in St. Elizabeth's Hospital in September, October, November and December, 1968, thereby intimating that he had been accused of another crime as the subject matter of the present case. It has long been established that it is improper for impeachment purposes to show accusations, arrest or indictment for a crime, particularly in a criminal case. Chebithes vs. Price,

59 App. D.C. 212, 37 F.2d 1008; Wondermaker vs. Lewis, 173 F. Supp. 126; Finwick vs. U.S., 102 U.S. App. D.C. 212, 252 F 2d. 124; Leigh vs. U.S., 113 U.S. App. D.C. 390, 308 F. 2d 345; Barnes vs. U.S. 124 U. S. App. D.C. 318, 365 F. 2d 509; Yeldel vs. U.S., 153 A.2d 637. In as much as there was direct conflict between the testimony of the Defendant Parker and the Government witnesses Malloy and Dawson, credibility was a crucial factor in this regard and this reference undoubtedly helped to weigh the scale of credibility against him.

CONCLUSION

For the reasons and grounds stated herein above, it is respectfully requested that the judgment of conviction of the Trial Court should be reversed and the case remaned to the District Court with direction that a judgment of acquittal be entered in regard to issue number I, or in the alternative, it is requested that the case be remanded for a new trial in regard to issue number two.

Respectfully submitted,

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